Gilbert S. Rothenberg

By Jasper L. Cummings, Jr. and Alan J.J. Swirski*

Gilbert Rothenberg is the Chief of the Appellate Section of the United States Department of Justice's Tax Division. He is also currently serving as Acting Deputy Assistant Attorney General for Review and Appellate.

Q Can you describe how you came to be interested in tax litigation?

A It was a combination of two things. First, as I was growing up in Richmond, Virginia, one of my parent's closest friends happened to be a general practice lawyer, Seymour Horowitz, and his colorful descriptions of his cases really interested me. And, in my second year of law school, I was simply enthralled with my first tax course, which was taught by the late Professor Janet Spragens at the American University Law School, who went on to found the law school's Tax Clinic. Before joining the faculty there, she worked for the Appellate Section of the Department of Justice's Tax Division, and after I took some additional tax courses (and liked them, too) Professor Spragens said, "You know, you might like this, Gil, you might want to apply to the Tax Division at DOJ," and the rest is history.

Q Can you describe the work of the Appellate Section of the Tax Division?

A Our mission is to handle all civil tax appeals throughout the country. (There is a small, specialized unit that does the criminal tax appeals.) The civil tax appeals we handle encompass cases from the Tax Court, which is about half our docket, and the balance originate in the district courts, the Court of Federal Claims, and an occasional state court. Our basic mission is to write briefs, present the oral arguments, and prepare all kinds of motions and oppositions and internal memoranda that go along with that, so that we are speaking with one voice and we have a uniform position in all tax cases throughout the country.

Q Approximately how many people work in the Appellate Section?

A We have about 60 folks, about 45 of whom are attorneys, and the rest are support staff. The staff is broken down into about 35 line attorneys, who prepare the first drafts of briefs, motions, etc., and then we have a senior staff of people we call Reviewers, who look over the briefs, make any appropriate changes, etc., and then there is me as Chief of the Appellate Section and my two Assistant Chiefs. Everything that goes out of our office is thus the product of at least two (and sometimes three) people looking at it. We have found that this is the best way to ensure consistency and a good product because we have attorneys who are working here with various degrees of experience. We have found that having at least two people look at our work product provides a fresh approach and ensures that we end up with a very high quality product.

Q For those who would like to work for the Appellate Section someday, what is your advice to them?

A My advice to them is to be the best writer you can be. Tax law is very complicated, but the skill, especially at the appellate court level, is to be able to tell a story involving a very complex subject matter and explain it in such a way that lay judges can understand it. And that is a skill of a very good writer. And so, writing skills are paramount, with analytical skills being close behind that in importance. A tax background, of course, is a huge plus, but if I have my choice of hiring a brilliant tax lawyer or a brilliant writer, I will pick the brilliant writer because it is easier for me to teach tax law to a brilliant writer than it is for me to teach a brilliant tax lawyer how to write. Indeed, some of our best performers did not come into my office with lots of tax law experience. It is certainly very helpful, but it is not the only thing I look at when I'm trying to decide whether to hire someone.

Q For our young readers who might be interested in working for you some day, how many people every year or so do you hire into the Appellate Section?

A It depends on both workload and budget constraints. Our budget has been increasing in recent years because of various new initiatives we have implemented. And, of course, we are still fighting the tax shelter wars as well. But, in a typical year, we might hire one or two persons directly out of either law school or a clerkship under the Attorney General's Honors Program, and then we might also hire one or two laterals. Traditionally, one-half of our attorney staff arrived through the Honors Program, the other half coming on board as lateral hires. But, for the past ten years or so, we have hired more experienced attorneys than Honors Program applicants.

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Q And of those few spots in an average year, how many applications do you receive for them?

A Well, in the recruiting that I did this past spring, we received 85 applications and we ended up hiring only two persons.

Q What is the relationship between the Tax Division and the Solicitor General's Office with respect to appeals from cases in the Tax Court, district courts, and the U.S. Court of Federal Claims?

A The Solicitor General's office oversees all government appeals throughout the nation on any matter, including tax matters. Up until about seven or eight years ago, there was a tax assistant in the Solicitor General's office. But, after that individual left the government to go into private practice, the position was not filled, in large part because there was a reduction in the volume of tax matters requiring the Solicitor General's attention. The Solicitor General's office currently has four deputies, and one of them, Malcolm Stewart, has tax within his portfolio. Whenever the government loses a case in the district courts (or the Court of Federal Claims), we prepare a memo for the Solicitor General's office, and that office, armed with our recommendation and that of the Internal Revenue Service, then decides whether or not to authorize an appeal. That process works for any higher levels of review as well, such as rehearing en banc petitions or petitions for certiorari. Cases coming out of the Tax Court are handled in a slightly different manner. Generally, unless we have a keen interest in a case, the Internal Revenue Service makes the first call as to whether or not they would like to take an appeal from an adverse Tax Court decision. If so, we take a look, and then we prepare our own recommendation. Both recommendations then go up to the Solicitor General's office for decision. As you can imagine, I work very closely with the Solicitor General's office, and that relationship has worked very well over the years.

Q How often do the IRS and Tax Division disagree on whether to appeal an adverse decision by the Tax Court?

A That situation, while not common, is not uncommon either. In my current role as Acting Deputy Assistant Attorney General (in addition to being Chief of the Appellate Section), I chair internal conferences where we all sit around a table and discuss the pros and cons of taking an appeal in a case that the government lost at the trial level. I consider all the facts and circumstances surrounding the case, and all internal disagreements are fully aired; at the end of the process, the Solicitor General's office is presented with the views of all of the interested stakeholders so that an informed decision can be made.

Q What is the relationship between the Tax Division and the Chief Counsel's Office?

A I work very closely with the Chief Counsel, the Deputy Chief Counsel and the various Associate Chief Counsels because, whether we are proceeding administratively or in litigation, we need to be on the same page. So, for instance, if we are in litigation on a particular issue and the Internal Revenue Service says, "Look, we have 2,000 pending administrative claims that are on hold," we need to know that in developing our own litigating strategy. This may turn out to be a very important issue, and we have to assemble sufficient resources to take care of it. Also, if we have some disagreements as to what should be our primary argument, what should be our secondary argument, and so forth, we will often confer with the IRS to get that office's take on the situation. Indeed, we exchange draft briefs in important cases to make sure our position is consistent with the IRS's litigating position in the Tax Court. At the same time, if the IRS is proposing to issue a new notice about something that touches upon our litigation, we want to know about it. So we have frequent meetings at a very high level to discuss these various common interests.

Q So if I understand you correctly, the Appellate Section can be involved in litigation while it is still at the administrative or trial court level?

A If it is the same issue, yes. We may have one issue on appeal in a couple of cases, and in other cases we may still be at the trial level, and still other cases may be at the administrative level at IRS. So, we have to make sure everybody is acting in a consistent manner.

Q What if you had an issue affecting hundreds of taxpayers and it was not yet even at appellate—would there be an occasion where you would confer with counsel or with trial lawyers in the Tax Division to make sure what is being argued will be in your view appropriate if it comes up on appeal?

A Yes, that is one of our roles—a kind of coordination role. We have an appellate person who is assigned to each of our large tax shelter cases, and that appellate lawyer will sit in on some strategy sessions to make sure that the evidence is going to support whatever position we are going to take and that Appellate is on board with that. While that type of coordination is at a "macro" level as opposed to a "micro" level, it is nevertheless an important part of our job.

Q In your view, what are the most significant tax appeals in the last 10 years?

A That is a tough list. And I think it demonstrates the broad reach of the Tax Division's Appellate Section. In the tax area, the Supreme Court has decided a number of important cases, many of which deal with procedural matters. Among them are the *Brockamp* case [519 U.S. 347 (1997)] decided 12 years ago, dealing with equitable tolling. The Supreme Court upheld the government's position, and it prompted Congress to step in and create some exceptions to deal with unfortunate factual circumstances. Another procedural decision was *Clintwood Elkhorn* [128 S. Ct. 1511 (2008)], where the Supreme Court reaffirmed the proposition that if you have a statute of limitations in a tax case, and it says three years, it is three years. A third case I might mention is the *Craft* case [535 U.S. 274 (2002)], dealing with federal tax liens in tenancy-by-the-entireties property and reaffirming the proposition that while state law may determine whether a property interest exists, it is the Internal Revenue Code that determines whether that property interest can be reached by the federal tax collector.

In terms of Court of Appeals cases, I would say that probably some of the most important ones are the appellate victories in the abusive corporate tax shelter area that were first decided in 2006. There were about four reversals in the summer of 2006 after taxpayers had won some significant trial court victories in cases involving facts that may have met the letter of the tax law but lacked economic substance. Those cases were *Coltec*, *Black & Decker*, *Castle Harbour*, and *Dow Chemical*. Those four appellate decisions really turned the tide as to whether the government was going to be able to win the tax shelter war. Other cases I think were significant in the past ten years include the *Swallows Holding* case in the Third Circuit [515 F.3d 162 (2008)] involving deference to Treasury Regulations. I argued that case personally, and the decision there reaffirmed the stance that the Supreme Court has been taking in recent years as to the proper deference owed to administrative regulations—*to wit*, where there is an ambiguous statute, a reasonable administrative regulation deciding between two permissible interpretations is entitled to *Chevron* deference. Finally, I think the *Murphy II* decision out of the D.C. Circuit [493 F.3d 170 (2007)], which I also personally argued, was a very important one because it vacated the unprecedented initial panel opinion, which had declared a federal taxing statute unconstitutional. *Murphy I* received a great deal of publicity, and the panel's reversal of position in *Murphy II* made it unnecessary to take the matter to the Supreme Court.

Insofar as current cases go, the most significant is probably the *Textron* case [577 F.3d 21 (2009)], decided by the First Circuit, sitting en banc, in August 2009. That case involves the scope of attorney work product, and thus has importance even outside the confines of federal tax law. And, we have a series of cases involving medical residents and whether they are subject to FICA taxes. The IRS issued a new regulation in 2005 that clarified the law, and the government won the first appeal in a case governed by the 2005 regulation.

Q Did the second decision in *Murphy* get as much publicity as the first?

A Yes and no. The original panel decision generated a large volume of blog comments and law review articles because it was just a perfect case for law professors to examine in light of its bizarre conclusion. The second decision did not generate the same volume of written comments because it should have been decided that way in the first place.

Q I wonder how many law review articles were left in a near finished state when the second decision came out.

A Probably a lot. Virtually every tax lawyer in this country, whether in private practice or in the government, knew the decision in *Murphy I* was wrong. It was just a question about what was going to happen next. It was one of those unusual situations, somewhat similar to what I experienced about 25 years ago when I was handling the *Tufts* case [651 F.2d 1058 (1981)] in the Fifth Circuit. In that instance, too, almost every tax lawyer in the country knew that the panel decision was wrong and, as every tax lawyer and law student taking tax knows, the Supreme Court unanimously reversed the Court of Appeals' decision in *Tufts*.

Q At times the United States suffers adverse decisions in the circuit courts. What factors go into the decision for the United States to request en banc review of a circuit decision in favor of a taxpayer?

A The importance of the issue presented is paramount in this regard—*Murphy I* is a perfect example. The virtually unprecedented nature of that decision made it a fairly easy call for us to recommend to the Solicitor General that we file a petition for rehearing en banc. Whether or not a case might be destined for Supreme Court review is another major consideration in this respect. If the case is important enough for us to consider a certiorari petition, the road to that destination generally includes a rehearing en banc stopover. Although rehearing en banc petitions are rarely granted, we do not generally skip that step if we think a case might warrant Supreme Court review.

Q What factors go into the United States' decision whether to oppose or acquiesce in a taxpayer request for a certiorari review in the Supreme Court?

A Well, if there is a clear circuit split, I will not hesitate to recommend to the Solicitor General that we acquiesce in a certiorari petition, and the Supreme Court will generally agree to hear such a case. But, the conflict has to be a direct one. Sometimes you have cases in which there is some disagreement in approach, but unless the results in the cases are different, there may be insufficient grounds for asking the Supreme Court to step into the fray.

Q I think you may have answered this next question in part by describing some of the victories of the Tax Division in the circuits in 2006. What has the Appellate Section's role been in the development of the economic substance doctrine beyond that?

A In my experience, I think that district judges on occasion may simply lose sight of the forest for the trees. They may get so immersed in the machinations of the particular tax shelter and its facial compliance with the provisions of the Code that they are unable to see the big picture. Appellate judges are almost always attuned to the big picture, however, and that may explain why there have been a fair number of appellate reversals of taxpayer trial court victories, at least in the early going, and a lot of our success on appeal in this area is due to the incredible dedication and hard work of the attorneys in my office assigned to those cases. They are the real heroes in this regard, and I am incredibly proud of the role they have played in slaying (thus far) the tax shelter beast. ■

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For several years thereafter, the Service seemed to be winning. There were several taxpayer victories, to be sure. *E.g., Sala v. United States*, 552 F. Supp. 2d 1167 (D. Colo. 2008), *new trial denied*, 251 F.R.D. 614 (on appeal to 10th Cir.); *Countryside Ltd. P'ship v. Commissioner*, 95 T.C.M. (CCH) 1006 (2008). But the Government prevailed more often. With each victory, more tax officials and others forgot the lesson of experience: that a pendulum moves in one direction only for a space, after which it reverses its course. *See, e.g.*, Jeremiah Coder, *Practitioners, Government Officials Debate Codification of Economic Substance*, 2009 TNT 222-6 (Nov. 20, 2009) (citing Service attorney William Sabin Jr., speaking on his own behalf, to the effect that the Service's recent successes reflect "a large shift from just a few years ago when the [economic substance] doctrine was held in low esteem by many judges" and quoting him as saying that the doctrine has "proven very effective and very reliable.").

It remains to be seen, of course, whether *Castle Harbour III* and *Con Ed* herald such a reversal. The Tenth Circuit is expected soon to issue its opinion in the *Sala* appeal; it is virtually certain that the government will appeal *Castle Harbour III*; and the Government may also appeal *Con Ed*. The results of these and other cases will tell the tale of the upcoming rounds. What can be said now, however, is that the Government has not yet achieved final victory in the tax shelter wars (if it ever will). The battle continues.

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Shelters as Part of Ongoing Business

Some taxpayers have found courts more inclined to approve their claimed tax benefits if the scheme that produced them was part of ongoing, substantial business rather than an adventitious arrangement. For example, in the *UPS* case, the Eleventh Circuit reversed the Tax Court and upheld the claimed tax benefits. In part, the circuit court reasoned: "The transaction under challenge here simply altered the form of an existing, bona fide business . . . . [T]here was a real business that served the genuine need for customers to enjoy loss coverage and for UPS to lower its liability exposure." *United Parcel Serv. of America, Inc. v. Commissioner*, 254 F.3d 1014, 1020 (11th Cir. 2001).

The ongoing, substantial business aspect was present—actually or arguably—in the recent tax shelter decisions in *Castle Harbour III* and *Con Ed*. From the time of its first trip to district court, "[s]ome observers have suggested that *Castle Harbour* fits within a line of cases upholding tax-motivated transactions in which taxpayers have demonstrated a direct relationship between the structure chosen to provide tax benefits and the